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6 **UNITED STATES DISTRICT COURT**  
7 **WESTERN DISTRICT OF WASHINGTON**  
8 **AT SEATTLE**

9 **CHERI L. DURBIN,**

10 **Plaintiff,**

11 **v.**

12 **MICHAEL J. ASTRUE, Commissioner of**  
13 **Social Security,**

**Defendant.**

**NO. C11-395-TSZ-JPD**

**REPORT AND**  
**RECOMMENDATION**

14 Plaintiff Cheri L. Durbin appeals the final decision of the Commissioner of the Social  
15 Security Administration (“Commissioner”) which denied her application for Disability  
16 Insurance Benefits (“DIB”) under Title II of the Social Security Act, 42 U.S.C. §§ 401-33,  
17 after a hearing before an administrative law judge (“ALJ”). For the reasons set forth below,  
18 the Court recommends that the Commissioner’s decision be REVERSED and REMANDED.

19 **I. FACTS AND PROCEDURAL HISTORY**

20 At the time of the administrative hearing, plaintiff was a fifty-one year old woman with  
21 a high school education and one year of technical training as a medical assistant.  
22 Administrative Record (“AR”) at 38-39. Her past work experience includes employment as a  
23 pharmacy technician from December 1979 to August 2000. AR at 39, 149.  
24

1 On March 27, 2007, she filed an application for DIB, alleging an onset date of August  
2 31, 2000. AR at 14, 82. In her application, plaintiff asserted that she was disabled due to  
3 fibromyalgia and degenerative disc disease of the cervical spine. AR at 82.

4 The Commissioner denied plaintiff's claim initially and on reconsideration. AR at 90-  
5 92, 99-100. Plaintiff requested a hearing, which took place on August 7, 2009. AR at 32-81.  
6 On August 31, 2009, the ALJ issued a decision finding plaintiff not disabled and denied  
7 benefits based on his finding that plaintiff could perform her past relevant work. AR at 16-25.  
8 The Appeals Council denied plaintiff's request for review, AR at 1-3, making the ALJ's ruling  
9 the "final decision" of the Commissioner as that term is defined by 42 U.S.C. § 405(g). On  
10 April 11, 2011, plaintiff timely filed the present action challenging the Commissioner's  
11 decision. Dkt. 5.

## 12 II. JURISDICTION

13 Jurisdiction to review the Commissioner's decision exists pursuant to 42 U.S.C. §§  
14 405(g) and 1383(c)(3).

## 15 III. STANDARD OF REVIEW

16 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of  
17 social security benefits when the ALJ's findings are based on legal error or not supported by  
18 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th  
19 Cir. 2005). "Substantial evidence" is more than a scintilla, less than a preponderance, and is  
20 such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.  
21 *Richardson v. Perales*, 402 U.S. 389, 201 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750  
22 (9th Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in  
23 medical testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*,  
24 53 F.3d 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a

1 whole, it may neither reweigh the evidence nor substitute its judgment for that of the  
2 Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is  
3 susceptible to more than one rational interpretation, it is the Commissioner's conclusion that  
4 must be upheld. *Id.*

5 The Court may direct an award of benefits where "the record has been fully developed  
6 and further administrative proceedings would serve no useful purpose." *McCartey v.*  
7 *Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002) (citing *Smolen v. Chater*, 80 F.3d 1273, 1292  
8 (9th Cir. 1996)). The Court may find that this occurs when:

9 (1) the ALJ has failed to provide legally sufficient reasons for rejecting the  
10 claimant's evidence; (2) there are no outstanding issues that must be resolved  
11 before a determination of disability can be made; and (3) it is clear from the  
record that the ALJ would be required to find the claimant disabled if he  
considered the claimant's evidence.

12 *Id.* at 1076-77; *see also Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000) (noting that  
13 erroneously rejected evidence may be credited when all three elements are met).

#### 14 IV. EVALUATING DISABILITY

15 As the claimant, Ms. Durbin bears the burden of proving that she is disabled within the  
16 meaning of the Social Security Act (the "Act"). *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th  
17 Cir. 1999) (internal citations omitted). The Act defines disability as the "inability to engage in  
18 any substantial gainful activity" due to a physical or mental impairment which has lasted, or is  
19 expected to last, for a continuous period of not less than twelve months. 42 U.S.C. §§  
20 423(d)(1)(A), 1382c(a)(3)(A). A claimant is disabled under the Act only if her impairments  
21 are of such severity that she is unable to do her previous work, and cannot, considering her age,  
22 education, and work experience, engage in any other substantial gainful activity existing in the  
23 national economy. 42 U.S.C. §§ 423(d)(2)(A); *see also Tackett v. Apfel*, 180 F.3d 1094, 1098-  
24 99 (9th Cir. 1999).

1 The Commissioner has established a five step sequential evaluation process for  
2 determining whether a claimant is disabled within the meaning of the Act. *See* 20 C.F.R. §§  
3 404.1520, 416.920. The claimant bears the burden of proof during steps one through four. At  
4 step five, the burden shifts to the Commissioner. *Id.* If a claimant is found to be disabled at  
5 any step in the sequence, the inquiry ends without the need to consider subsequent steps. Step  
6 one asks whether the claimant is presently engaged in “substantial gainful activity.” 20 C.F.R.  
7 §§ 404.1520(b), 416.920(b).<sup>1</sup> If she is, disability benefits are denied. If she is not, the  
8 Commissioner proceeds to step two. At step two, the claimant must establish that she has one  
9 or more medically severe impairments, or combination of impairments, that limit her physical  
10 or mental ability to do basic work activities. If the claimant does not have such impairments,  
11 she is not disabled. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the claimant does have a severe  
12 impairment, the Commissioner moves to step three to determine whether the impairment meets  
13 or equals any of the listed impairments described in the regulations. 20 C.F.R. §§ 404.1520(d),  
14 416.920(d). A claimant whose impairment meets or equals one of the listings for the required  
15 twelve-month duration requirement is disabled. *Id.*

16 When the claimant’s impairment neither meets nor equals one of the impairments listed  
17 in the regulations, the Commissioner must proceed to step four and evaluate the claimant’s  
18 residual functional capacity (“RFC”). 20 C.F.R. §§ 404.1520(e), 416.920(e). Here, the  
19 Commissioner evaluates the physical and mental demands of the claimant’s past relevant work  
20 to determine whether she can still perform that work. 20 C.F.R. §§ 404.1520(f), 416.920(f). If  
21 the claimant is able to perform her past relevant work, she is not disabled; if the opposite is

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23 <sup>1</sup> Substantial gainful activity is work activity that is both substantial, i.e., involves  
24 significant physical and/or mental activities, and gainful, i.e., performed for profit. 20 C.F.R. §  
404.1572.

1 true, then the burden shifts to the Commissioner at step five to show that the claimant can  
2 perform other work that exists in significant numbers in the national economy, taking into  
3 consideration the claimant's RFC, age, education, and work experience. 20 C.F.R. §§  
4 404.1520(g), 416.920(g); *Tackett*, 180 F.3d at 1099, 1100. If the Commissioner finds the  
5 claimant is unable to perform other work, then the claimant is found disabled and benefits may  
6 be awarded.

## 7 V. DECISION BELOW

8 On August 31, 2009, the ALJ issued a decision finding the following:

- 9 1. The claimant last met the insured status requirements of the Social  
10 Security Act on December 31, 2005.
- 11 2. The claimant did not engage in substantial gainful activity during the  
12 period from her alleged onset date of August 31, 2000 through her  
13 date last insured of December 31, 2005.
- 14 3. Through the date last insured, the claimant had the following severe  
15 impairments: fibromyalgia, degenerative disc disease, diabetes, sleep  
16 apnea, obesity, depression and anxiety.
- 17 4. Through the date last insured, the claimant did not have an impairment  
18 or combination of impairments that met or medically equaled one of  
19 the listed impairments in 20 CFR Part 404, Subpart P, Appendix 1.
- 20 5. After careful consideration of the entire record, the undersigned finds  
21 that, through the date last insured, the claimant had the residual  
22 functional capacity on a sustained basis (i.e. 8 hours per day, 5 days  
23 per week, week after week, month after month with a 15 minutes  
24 break in the morning and one in the afternoon and a 30-minute lunch  
break) for a significant period of time to perform light work as defined  
in 20 C.F.R. 404.1567(b) with an ability to lift and carry 20 pounds  
occasionally and 10 pounds frequently with a sit/stand option at will  
and an ability to walk 4 hours in an 8-hour workday. Her ability to  
push and pull and gross and fine dexterity was unlimited. The claimant  
was able to occasionally climb stairs but should not climb ladders,  
ropes, scaffolds or run. She was able to occasionally bend, stoop,  
crouch, crawl, balance, twist and squat. The claimant should have had  
limited exposure to vibration. Mentally, the claimant was able to get  
along with others, understand details instructions, concentrate and  
perform detailed tasks and adapt to workplace changes and  
supervision.

1 6. Through the date last insured, the claimant was capable of performing  
2 past relevant work as a pharmacy technician. This work did not require  
the performance of work related activities preclude by the claimant's  
residual functional capacity.

3 7. The claimant was not under a disability, as defined in the Social  
4 Security Act, at any time from August 31, 2000, the alleged onset date,  
through December 31, 2005, the date last insured.

5 AR at 16-25.

## 6 VI. ISSUES ON APPEAL

7 The principal issues on appeal are:

- 8 1. Did the ALJ err in evaluating plaintiff's credibility?
- 9 2. Did the ALJ err in evaluating the opinion of treating physician, Dr. Anderson?
- 10 3. Did the ALJ err by failing to include an opinion regarding the "B" criteria from  
11 a physician or psychologist?
- 12 4. Did the ALJ err in assessing plaintiff's RFC by failing to evaluate the amount of  
time plaintiff could sit or stand during a typical work day?
- 13 5. Did the ALJ err in evaluating the lay witness testimony of plaintiff's husband,  
Robert Durbin?
- 14 6. Did the ALJ err by finding that plaintiff could perform her past relevant work?

15 Dkt. 16 at 1-2; Dkt. 20 at 1-2.

## 17 VII. DISCUSSION

### 18 A. The ALJ Erred in Evaluating Plaintiff's Credibility

19 Plaintiff contends that the ALJ failed to provide clear and convincing reasons for  
20 rejecting plaintiff's testimony. Dkt. 16 at 15-16. The Commissioner responds that the ALJ  
21 properly discredited plaintiff's testimony in this case. Dkt. 20 at 3-8.

22 As noted above, credibility determinations are within the province of the ALJ's  
23 responsibilities, and will not be disturbed, unless they are not supported by substantial  
24

1 evidence. A determination of whether to accept a claimant's subjective symptom testimony  
2 requires a two-step analysis. 20 C.F.R. §§ 404.1529, 416.929; *Smolen*, 80 F.3d at 1281; SSR  
3 96-7p. First, the ALJ must determine whether there is a medically determinable impairment  
4 that reasonably could be expected to cause the claimant's symptoms. 20 C.F.R.  
5 §§ 404.1529(b), 416.929(b); *Smolen*, 80 F.3d at 1281-82; SSR 96-7p. Once a claimant  
6 produces medical evidence of an underlying impairment, the ALJ may not discredit the  
7 claimant's testimony as to the severity of symptoms solely because they are unsupported by  
8 objective medical evidence. *Bunnell v. Sullivan*, 947 F.2d 341, 343 (9th Cir. 1991) (en banc);  
9 *Reddick*, 157 F.3d at 722. Absent affirmative evidence showing that the claimant is  
10 malingering, the ALJ must provide "clear and convincing" reasons for rejecting the claimant's  
11 testimony. *Smolen*, 80 F.3d at 1284; *Reddick*, 157 F.3d at 722.

12 When evaluating a claimant's credibility, the ALJ must specifically identify what  
13 testimony is not credible and what evidence undermines the claimant's complaints; general  
14 findings are insufficient. *Smolen*, 80 F.3d at 1284; *Reddick*, 157 F.3d at 722. The ALJ may  
15 consider "ordinary techniques of credibility evaluation" including a reputation for truthfulness,  
16 inconsistencies in testimony or between testimony and conduct, daily activities, work record,  
17 and testimony from physicians and third parties concerning the nature, severity, and effect of  
18 the symptoms of which he complains. *Smolen*, 80 F.3d at 1284; *see also Light v. Social Sec.*  
19 *Admin.*, 119 F.3d 789, 792 (9th Cir. 1997).

20 The ALJ found that plaintiff's "medically determinable impairments could reasonably  
21 be expected to cause the alleged symptoms; however, the claimant's statements . . . concerning  
22 the intensity, persistence and limiting effects of these symptoms are not credible to the extent  
23 they are inconsistent with the above residual functional capacity assessment." AR at 21.  
24 Specifically, the ALJ cited (1) inconsistency between plaintiff's testimony regarding her

1 functional limitations and objective medical evidence in the record, and (2) inconsistency  
2 between plaintiff's allegations and activities of daily living, and (3) plaintiff's history of  
3 noncompliance with her medication and treatment regimen. AR at 21-24.

4 1. *Inconsistency Between Testimony and Objective Medical Evidence*

5 The ALJ found that the objective medical evidence did not support the severity of  
6 plaintiff's allegations. AR at 21-23. The ALJ noted that "[f]actors for consideration in  
7 evaluating an individual's subjective complaints of pain include whether there is  
8 documentation of persistent significant limitations of range of motion, muscle spasm, muscular  
9 atrophy from lack of use, significant neurological deficits, weight loss, or impairment of  
10 general nutrition and non-alleviation of symptoms by medication." AR at 21. However, the  
11 ALJ found that "[n]one of the claimant's examinations disclosed the above findings to any  
12 significant degree." AR at 21. Specifically, the ALJ noted that "[r]adiological findings of the  
13 lumbar spine in April 2001 showed multilevel degenerative disc and facet degeneration,  
14 persistent moderate central/right paracentral L5-21 disc extrusion with right S1 nerve root  
15 displacement." AR at 21 (citing AR at 369). The ALJ noted that "[d]espite these findings, in  
16 an office visit dated October 4, 2002, the claimant had 5/5 strength. There was evidence of  
17 only intermittent dysesthesia upon sensation examination" as well as a full range of motion in  
18 the cervical spine. AR at 21 (citing AR at 335). When plaintiff was examined on March 14,  
19 2002, she reported chronic low back pain but significant improvement with Vicodin and  
20 Flexeril. AR at 21 (citing AR at 317).

21 Plaintiff asserts that with the exception of the ALJ's discussion of plaintiff's daily  
22 activities, the ALJ's "remaining credibility assessment is not entirely clear" and "the ALJ's  
23 piecemeal discussion of the medical evidence does not show that Plaintiff's impairments did  
24 not result in the symptoms she alleged." Dkt. 16 at 17. Moreover, because plaintiff has



1 produced evidence of an underlying impairment, plaintiff asserts that “the ALJ cannot discredit  
2 her testimony as to the severity of her symptoms solely because they are unsupported by  
3 objective medical evidence.” *Id.* (citing *Bunnell v. Sullivan*, 947 F.2d 341, 343 (9th Cir.  
4 1991); *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1988)). Plaintiff also contends that  
5 contrary to the ALJ’s assertion, some of plaintiff’s medical examinations did show limited  
6 range of motion (AR at 471, 731, 727), spasm (AR at 310, 340, 754, 493, 735, 731), and  
7 neurological deficits (AR at 471). Dkt. 16 at 18. Finally, plaintiff claims that the ALJ erred by  
8 requiring objective evidence that supports plaintiff’s allegations because her primary  
9 impairment is fibromyalgia, which “would not be expected to result in most of these objective  
10 findings (other than non-alleviation of symptoms by medication).” *Id.* (citing *Benecke v.*  
11 *Barnhart*, 379 F.3d 587, 592 (9th Cir. 2004) (holding that the ALJ erred by discounting a  
12 plaintiff’s credibility based upon the lack of objective evidence for a disease such as  
13 fibromyalgia that eludes such measurement)).

14       The ALJ erred by rejecting plaintiff’s testimony on the grounds that it was unsupported  
15 by objective medical evidence. The Ninth Circuit has asserted that although “subjective pain  
16 testimony cannot be rejected on the sole ground that it is not fully corroborated by objective  
17 medical evidence, the medical evidence is still a relevant factor in determining the severity of a  
18 claimant’s pain and its disabling effects.” *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir.  
19 2001); *see also Burch v. Barchart*, 400 F.3d 676, 681 (9th Cir. 2005) (“Although lack of  
20 medical evidence cannot form the sole basis for discounting pain testimony, it is a factor that  
21 the ALJ can consider in his credibility analysis.”); SSR 96–7, \*2–3 (the ALJ “must consider  
22 the entire case record, including the objective medical evidence” in determining credibility, but  
23 statements “may not be disregarded solely because they are not substantiated by objective  
24 medical evidence”). Although inconsistency between plaintiff’s allegations and the objective

1 medical evidence was a relevant factor for the ALJ to consider, among others, in determining  
2 plaintiff's credibility, the ALJ did not meet his burden in this case of "stat[ing] which pain  
3 testimony is not credible and what evidence suggests the claimants are not credible." *Dodrill*,  
4 12 F.3d at 918; *see also Holohan*, 246 F.3d at 1208 ("[T]he ALJ must specifically identify the  
5 testimony she or he finds not to be credible and must explain what evidence undermines the  
6 testimony.").

7       The ALJ's attempt to discount plaintiff's subjective complaints based upon the lack of  
8 corroborating objective evidence was also particularly egregious in this case, in light of the  
9 ALJ's acknowledgement that plaintiff suffers from severe fibromyalgia, a disease that is  
10 notable for its lack of objective diagnostic techniques. *See Sarchet v. Chater*, 78 F.3d 305, 306  
11 (7th Cir. 1996). Specifically, the Ninth Circuit has recognized that "[fibromyalgia's] cause or  
12 causes are unknown, there is no cure, and, of greatest importance to disability law, its  
13 symptoms are entirely subjective. There are no laboratory tests for the presence or severity of  
14 fibromyalgia." *Rollins v. Massanari*, 261 F.3d 853, 855 (9th Cir. 2001) (citing *Sarchet*, 78 F.3d  
15 at 306). Put differently, "the absence of swelling joints or other orthopedic and neurologic  
16 deficits is no more indicative that the patient's fibromyalgia is not disabling than the absence  
17 of a headache is an indication that a patient's prostate cancer is not advanced." *Green-Younger*  
18 *v. Barnhart*, 335 F.3d 99, 109 (2d Cir. 2003) (internal quotation omitted). Thus, as argued by  
19 the plaintiff, the ALJ erred in this case by "effectively requir[ing] objective evidence for a  
20 disease that eludes such measurement." *Benecke v. Barnhart*, 379 F.3d 587, 594 (9th Cir.  
21 2004) (internal citations omitted).

22       This does not mean that every claimant asserting fibromyalgia receives a pass to a  
23 disability finding. It does mean, however, that an ALJ who does not consider a plaintiff  
24 suffering from fibromyalgia to be credible must specifically identify what testimony is not

1 credible and what evidence undermines the claimant's complaints by employing ordinary  
2 techniques of credibility evaluation. *See Smolen*, 80 F.3d at 1284. Inconsistency with the  
3 objective medical evidence was not a clear and convincing reason for the ALJ to reject  
4 plaintiff's testimony in this case.

5                   2.       *Inconsistency between Plaintiff's Testimony and Her Daily Activities*

6           With respect to plaintiff's activities of daily living, the ALJ noted that "at the hearing,  
7 the claimant reported that she provides transportation for her daughter back and forth to school.  
8 She further prepared breakfast for her daughter and folded clothes, as well as read a lot of self-  
9 help books and used the computer to research during the relevant period under consideration."  
10 AR at 23. The ALJ also noted that "the claimant indicated that [she] researches scrap booking  
11 and card making and has the supplies but was easily frustrated when attempting to engage in  
12 the activities. In addition, during the relevant period under consideration, the claimant stated  
13 that she traveled to Maui for 10 days in 2003." AR at 23-24. The ALJ noted that plaintiff  
14 "occasionally went out to lunch with a friend but rested after the outing. In written statements,  
15 the claimant reported that she was able to water her plants, clean her countertops, fold clothes,  
16 drive and shop for craft items and books approximately once a week." AR at 24. Finally, the  
17 ALJ noted that "when seen on April 11, 2002, the claimant reported that she was walking on a  
18 daily basis." AR at 24 (citing AR at 316).

19           Plaintiff's daily activities constitute a clear and convincing reason for the ALJ to  
20 challenge plaintiff's credibility, and the ALJ's conclusion was amply supported by the record  
21 in this case. *See Reddick*, 157 F.3d at 722. As noted at the outset, credibility determinations  
22 are particularly within the province of the ALJ. The ALJ also properly supported his finding  
23 with a detailed examination of the record.

1                   3.       *Noncompliance with Medications and Treatment Regimen*

2           The ALJ also found that “the medical record shows the claimant has a history of  
3 noncompliance with her medication and treatment regimen.” AR at 21. Specifically, the ALJ  
4 noted that “[w]hen examined on December 6, 2002, the claimant expressed not checking her  
5 glucose as often as recommended . . . When seen on September 18, 2003, it was expressed that  
6 the claimant was not taking any TCD, glucophage or sulfonamide. Further, it was noted that  
7 the claimant was not monitoring her glucose levels on a regular basis.” AR at 21-22 (citing  
8 AR at 296, 302). In addition, the ALJ noted that on September 12, 2005, “the claimant  
9 reported blood sugars from 90 to 180. However, she indicated that she was having difficulty  
10 following the diet and had not started the Actos 45 mg as recommended.” AR at 22. At that  
11 time, plaintiff “had not started her glucophage as advised. The examining physician [Dr.  
12 Anderson] expressed that the claimant was ‘resistant to taking any medications.’” AR at 22.

13           Plaintiff contends that “[t]he ALJ failed to note that Plaintiff had been successful in  
14 dieting and had lost 30 pounds. When tested, her glucose was within normal limits.” Dkt. 16  
15 at 19 (citing AR at 295, 337). In addition, plaintiff asserts that the ALJ failed to note that  
16 plaintiff had reported an inability to exercise due to her pain, and she was having significant  
17 problems with her mood on 30 mg per day of Paxil and therefore this was increased. *Id.* (citing  
18 AR at 296). In other words, plaintiff contends that the ALJ should have considered this  
19 additional evidence before drawing an adverse inference that plaintiff had failed to follow  
20 prescribed treatment. The Commissioner responds that the ALJ properly found that “the  
21 medical record showed Plaintiff had a history of noncompliance with her medication and  
22 treatment regimen.” Dkt. 20 at 4 (citing AR at 21).

23           SSR 96-7p provides that an “individual’s statements may be less credible if the level or  
24 frequency of treatment is inconsistent with the level of complaints, or if the medical reports or

1 records show that the individual is not following the treatment as prescribed and there are no  
2 good reasons for this failure.”<sup>2</sup> Specifically, “the adjudicator must not draw any inferences  
3 about an individual’s symptoms and their functional effects from a failure to seek or pursue  
4 regular medical treatment without first considering any explanations that the individual may  
5 provide . . . that may explain infrequency or irregular medical visits or failure to seek medical  
6 treatment. The adjudicator may need to . . . question the individual at the administrative  
7 proceeding in order to determine whether there are good reasons the individual does not seek  
8 medical treatment or does not pursue treatment in a consistent manner.” SSR 96-7p.

9 In this case, the ALJ complied with SSR 96-7p during the 2009 hearing because he  
10 questioned plaintiff regarding evidence in the medical record suggesting that plaintiff failed to  
11 follow prescribed treatment for her diabetes. The ALJ also provided plaintiff with ample  
12 opportunity to explain this evidence. AR at 47-48. SSR 96-7 provides that an ALJ should  
13 consider plaintiff’s explanations for evidence of noncompliance in the record, but does not  
14 require an ALJ to accept those explanations.

15 Specifically, the ALJ asked the plaintiff when she was diagnosed with diabetes, and  
16 how she manages it. AR at 47. Plaintiff responded that she took pills until 2008, when she  
17 started on insulin. AR at 47. When the ALJ asked plaintiff what her blood sugar reading was  
18 that morning, plaintiff responded that she “did not take it this morning.” AR at 47. When  
19 asked what her reading was the last time she took it, plaintiff responded that “two days ago in  
20 the morning” her reading was 246. AR at 47. Plaintiff conceded that she should be taking her  
21 reading every day. AR at 47. Plaintiff also asserted that her doctor does not have her on a

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22 <sup>2</sup> Social Security Rulings do not have the force of law. Nevertheless, they “constitute Social  
23 Security Administration (SSA) interpretations of the statute it administers and of its own regulations,”  
24 and are binding on all SSA adjudicators. 20 C.F.R. § 402.35(b); *Holohan v. Massanari*, 246 F.3d 1195,  
1203 n.1 (9th Cir. 2001). Accordingly, such rulings are given deference by the courts “unless they are  
plainly erroneous or inconsistent with the Act or regulations.” *Han v. Bowen*, 882 F.2d 1453, 1457 (9th  
Cir. 1989).

1 special diet, although she did complete a diabetes program when she was first diagnosed. AR  
2 at 47. Plaintiff stated that “it seems like with so many things going on that’s just not  
3 something I can take care of right now.” AR at 47. Later in the hearing, plaintiff also  
4 explained that her uncontrolled diabetes prevented her from having carpal tunnel surgery on  
5 her hands “because with the diabetes not being controlled, [the doctors] said the chance of  
6 infection and the change that it would take so much longer to heal.” AR at 51.

7 Based upon this evidence, plaintiff’s noncompliance with recommended treatment was  
8 a clear and convincing reason for the ALJ to draw an adverse credibility assessment. Thus, the  
9 ALJ provided two clear and convincing reasons for finding plaintiff less than credible in this  
10 case. However, as discussed below, this case is being remanded for reevaluation of the  
11 medical opinion evidence, plaintiff’s RFC, and the lay witness evidence. In light of the ALJ’s  
12 error in discounting plaintiff’s testimony due to inconsistency with objective medical evidence,  
13 the ALJ shall also reevaluate plaintiff’s credibility on remand.

14 B. The ALJ Erred in Evaluating the Medical Opinion Evidence

15 I. *Standards for Reviewing Medical Evidence*

16 As a matter of law, more weight is given to a treating physician’s opinion than to that  
17 of a non-treating physician because a treating physician “is employed to cure and has a greater  
18 opportunity to know and observe the patient as an individual.” *Magallanes v. Bowen*, 881 F.2d  
19 747, 751 (9th Cir. 1989); *see also Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). A treating  
20 physician’s opinion, however, is not necessarily conclusive as to either a physical condition or  
21 the ultimate issue of disability, and can be rejected, whether or not that opinion is contradicted.  
22 *Magallanes*, 881 F.2d at 751. If an ALJ rejects the opinion of a treating or examining  
23 physician, the ALJ must give clear and convincing reasons for doing so if the opinion is not  
24 contradicted by other evidence, and specific and legitimate reasons if it is. *Reddick v. Chater*,

1 157 F.3d 715, 725 (9th Cir. 1988). “This can be done by setting out a detailed and thorough  
2 summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and  
3 making findings.” *Id.* (citing *Magallanes*, 881 F.2d at 751). The ALJ must do more than  
4 merely state his conclusions. “He must set forth his own interpretations and explain why they,  
5 rather than the doctors’, are correct.” *Id.* (citing *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th  
6 Cir. 1988)). Such conclusions must at all times be supported by substantial evidence. *Reddick*,  
7 157 F.3d at 725.

8 The opinions of examining physicians are to be given more weight than non-examining  
9 physicians. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Like treating physicians, the  
10 uncontradicted opinions of examining physicians may not be rejected without clear and  
11 convincing evidence. *Id.* An ALJ may reject the controverted opinions of an examining  
12 physician only by providing specific and legitimate reasons that are supported by the record.  
13 *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).

14 Opinions from non-examining medical sources are to be given less weight than treating  
15 or examining doctors. *Lester*, 81 F.3d at 831. However, an ALJ must always evaluate the  
16 opinions from such sources and may not simply ignore them. In other words, an ALJ must  
17 evaluate the opinion of a non-examining source and explain the weight given to it. Social  
18 Security Ruling (“SSR”) 96-6p, 1996 WL 374180, at \*2. Although an ALJ generally gives  
19 more weight to an examining doctor’s opinion than to a non-examining doctor’s opinion, a  
20 non-examining doctor’s opinion may nonetheless constitute substantial evidence if it is  
21 consistent with other independent evidence in the record. *Thomas v. Barnhart*, 278 F.3d 947,  
22 957 (9th Cir. 2002); *Orn*, 495 F.3d at 632-33.

23 2. *Dr. Anderson*

24 Timothy Anderson, D.O., has served as plaintiff’s treating physician since 1993. AR at

1 1018. On July 28, 2009, Dr. Anderson wrote a letter documenting plaintiff's most prominent  
2 problems, which included fibromyalgia with chronic fatigue syndrome, degenerative arthritis  
3 in her cervical and lumbar spine and hips, and depression. AR at 1018-19. He also noted that  
4 plaintiff's hypertension, diabetes, and hypothyroidism impact her overall health. AR at 1019.  
5 With respect to plaintiff's fibromyalgia, Dr. Anderson asserted that "Ms. Durbin has had these  
6 symptoms for a number of years and was first diagnosed in 2002. She has become  
7 progressively disabled over the past few years due to the above symptoms." AR at 1018. Dr.  
8 Anderson opined that plaintiff "has not been capable of gainful employment on a continuous  
9 basis since December 31, 2005." AR at 1019. Finally, he opined that plaintiff can lift and  
10 carry five pounds frequently and ten pounds occasionally, seldom bend, squat, kneel, crawl and  
11 climb, and can tolerate exposure to unprotected heights, moving machinery, marked changes in  
12 temperature and humidity, and driving automobile equipment. AR at 1020.

13 In assigning "little weight" to Dr. Anderson's opinion, the ALJ found that "the  
14 objective medical evidence as considered as a whole, as well as the progress notes of Dr.  
15 Anderson[,] fails to provide support for this opinion." AR at 24. For example, the ALJ noted  
16 that when Dr. Anderson saw plaintiff "on November 14, 2005, the claimant was not in any  
17 distress . . . Examination of the extremities was unremarkable." AR at 24. In addition, the  
18 ALJ noted that "objective evidence of 'trigger point' testing and results during the relevant  
19 period is lacking in the record." AR at 24. The ALJ also noted that when seen one month after  
20 the date Dr. Anderson noted plaintiff was unable to work, her physical examination was  
21 unchanged. AR at 24-25 (citing AR at 805).

22 Plaintiff contends that because "no other physician offered an opinion regarding  
23 plaintiff's limitations . . . the ALJ's reasons for rejecting Dr. Anderson's opinion must  
24



1 be clear and convincing.” Dkt. 16 at 21. Plaintiff asserts that although “the ALJ rejected Dr.  
2 Anderson’s report in part because there were no results of trigger points during the relevant  
3 period . . . [t]he evidence, however, shows that Plaintiff had trigger points on rheumatological  
4 evaluation.” Dkt. 16 at 21 (citing AR at 347, 342, 1034). Plaintiff contends that the other  
5 medical evidence cited by the ALJ as reasons for discrediting Dr. Anderson’s opinion, such as  
6 the fact that plaintiff’s blood pressure was normal, examinations of her extremities were  
7 unremarkable, and plaintiff denied hypoglycemia, “are not relevant to Dr. Anderson’s opinion  
8 and do not provide valid reasons for rejecting it.” *Id.* (citing *Orn*, 495 F.3d at 635).  
9 Specifically, plaintiff contends that Dr. Anderson’s opinion was largely based on his  
10 knowledge of plaintiff’s limitations due to pain, as he has been treating plaintiff regularly for  
11 many years and pain was a frequent focus on their visits. *Id.* (citing AR at 229, 245, 249, 252-  
12 53, 293, 295-96, 298, 300, 310, 313, 317). In the examination cited by the ALJ, for example,  
13 plaintiff rated her pain as an eight on a scale of one to ten. AR at 225.

14 The Commissioner responds that “the ALJ properly considered the medical source  
15 opinion” and carefully crafted a RFC assessment. Dkt. 20 at 9-10. The Commissioner also  
16 contends that “the ALJ properly found the medical evidence lacked objective findings to  
17 support the existence of limitations greater than the ALJ assessed.” *Id.* at 10 (citing *Thomas*,  
18 278 F.3d at 957 (providing that a physician’s opinion that is based on plaintiff’s non-credible  
19 subjective complaints is appropriately rejected)).

20 The ALJ improperly rejected Dr. Anderson’s opinion regarding the severity of  
21 plaintiff’s limitations stemming from her fibromyalgia based upon the lack of objective  
22 medical evidence in the record to support his opinion. Specifically, the lack of objective  
23 medical findings throughout Dr. Anderson’s treatment notes could not serve as a basis for  
24 rejecting this treating physician’s opinion, because the lack of objective medical evidence was

1 consistent with the nature and symptoms of fibromyalgia. As discussed above, fibromyalgia's  
2 cause or causes are unknown, there is no cure, and of greatest importance to disability law, its  
3 symptoms are entirely subjective. There are no objective physical signs, laboratory results, or  
4 x-rays that test for the presence or severity of fibromyalgia. *See Jordan v. Northrop*, 370 F.3d  
5 859, 872-73 (9th Cir. 2004) (providing that "[o]bjective tests are administered to rule out other  
6 diseases, but do not establish the presence or absence of fibromyalgia."). Thus, the lack of  
7 objective medical findings in Dr. Anderson's treatment notes cannot serve as a basis for  
8 discounting or discrediting Dr. Anderson's medical opinion. It is error to effectively require  
9 "objective evidence" for a disease that eludes such measurement. *See Benecke*, 379 F.3d at  
10 594.

11 The ALJ's conclusion constituted error for others reasons as well. Even had there been  
12 substantial conflicting evidence in the record from another physician regarding the impact of  
13 plaintiff's fibromyalgia on her ability to work, all that would mean is that Dr. Anderson's  
14 opinion would not have been entitled to "controlling weight." 20 C.F.R. § 404.1527(d)(2). In  
15 such a situation, an ALJ must consider the factors listed in § 404.1527(d)(2)-(6) in determining  
16 what weight to accord the opinion of the treating physician.<sup>3</sup> No such discussion occurred in  
17 the ALJ's decision, although he appears to have concluded that Dr. Anderson's opinion was  
18 inconsistent with the opinion of the state agency reviewing physician. AR 24-25. Finally, the  
19 ALJ's treatment of Dr. Anderson's conclusion is flawed because there appears to be no  
20 deferential treatment of his assessment. Even if contradicted by the opinion of the state agency  
21

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22  
23 <sup>3</sup> These include length of the treatment relationship and the frequency of examination;  
24 nature and extent of the treatment relationship; supportability; consistency; specialization; and  
other factors. *Id.*

1 reviewing physician, as plaintiff's treating physician, Dr. Anderson's opinion was still entitled  
2 to deference. *Orn*, 495 F.3d at 632-33.

3 Accordingly, this case shall be remanded for further administrative proceedings. On  
4 remand, the ALJ is directed to reassess Dr. Anderson's medical opinion in light of the direction  
5 provided by this opinion.

6 C. The ALJ Did Not Err In Evaluating Plaintiff's Mental Impairments

7 Plaintiff contends that although the ALJ determined that plaintiff had severe mental  
8 impairments, and concluded that plaintiff's impairments did not meet or equal a listing,  
9 "longstanding policy requires that the judgment of a physician (or psychologist) designated by  
10 the Commissioner on the issue of equivalence on the evidence before the administrative law  
11 judge . . . must be received into the record as expert opinion evidence and given appropriate  
12 weight." SSR 96-6p. Plaintiff asserts that in July 2007, Caral Van Dam, Ph.D. reviewed the  
13 record prior to the initial denial and concluded there was "insufficient evidence" to rate  
14 plaintiff's mental impairments. Dkt. 16 at 15 (citing AR at 451, 461). Plaintiff contends that  
15 "[b]ecause the record contained no opinion regarding equivalence in this case, the ALJ should  
16 have called a medical expert to testify regarding the 'B' criteria given the new evidence in this  
17 case." *Id.*

18 The Commissioner responds that the plaintiff "offers no material challenge to the ALJ's  
19 analysis that would satisfy her burden to show error in this case. Nor does she offer any  
20 plausible theory as to how she meets or equals a Listing. No evidence in the record shows  
21 Plaintiff had any marked limitations or a single episode of decompensation." Dkt. 20 at 11. In  
22 light of the ALJ's detailed explanation as to why plaintiff did not meet the paragraph B criteria,  
23 and because plaintiff "offers no plausible theory showing her impairments meet a listing," the  
24

1 Commissioner contends that the ALJ's step three finding was supported by substantial  
2 evidence. *Id.*

3 At step three of the evaluation process, the ALJ must determine whether a claimant has  
4 an impairment or combination of impairments that meets or equals a condition outlined in the  
5 Listing. *See* 20 C.F.R. §§ 404.1520(d), 416.920(d). "An ALJ must evaluate the relevant  
6 evidence before concluding that a claimant's impairments do not meet or equal a listed  
7 impairment. A boilerplate finding is insufficient to support a conclusion that a claimant's  
8 impairment does not do so." *Lewis v. Apfel*, 236 F.3d 503, 512 (9th Cir. 2001) (citing *Marcia*  
9 *v. Sullivan*, 900 F.2d 172, 176 (9th Cir. 1990)). In order for a claimant's impairment or  
10 combination of impairments to meet the requirements of a listing, all of the criteria of that  
11 listing and the duration requirement must be satisfied. *See* 20 C.F.R. §§ 404.1525(c)(1)-(3);  
12 416.925(c) (1)-(3); *see also* SSR 83-19 ("[a]n impairment 'meets' a listed condition in the  
13 Listing of Impairments only when it manifests the specific findings described in the set of  
14 medical criteria for that listed impairment."). To equal a listed impairment, a claimant's  
15 impairment or combination of impairments must "at least equal in severity and duration" the  
16 criteria of a listed impairment. *See* 20 C.F.R. §§ 404.1526(a), 416.926(a); *see also* SSR 83-19  
17 (a claimant's impairment is "equivalent" to a listing only if her symptoms, signs, and  
18 laboratory findings are "at least equivalent in severity" to the criteria for the listed impairment  
19 most like the claimant's impairment). A claimant bears the burden of proving that he or she  
20 has an impairment that meets or equals the criteria of a listed impairment. *See Burch*, 400 F.3d  
21 at 683 ("[A]n ALJ is not required to discuss the combined effects of a claimant's impairments  
22 or compare them to any listing in an equivalency determination, unless the claimant presents  
23 evidence in an effort to establish equivalence.") (citation omitted); *see also Lewis*, 236 F.3d at  
24 514 (holding that an ALJ's failure to consider equivalence was not reversible error where the

1 claimant offered no theory, plausible or otherwise, as to how his impairments combined to  
2 equal a listed impairment).

3 The decision to call a medical expert for additional evidence on the nature and severity  
4 of impairments is required only “[w]hen . . . in the opinion of the [ALJ] or the Appeals Council  
5 the symptoms, signs and laboratory findings reported in the case record suggest that a  
6 judgment of equivalence may be reasonable.” SSR 96-6p. Here, the ALJ reasonably  
7 determined that the medical records did not suggest that plaintiff’s mental impairments met a  
8 listing. Furthermore, as argued by the Commissioner, plaintiff has offers no plausible theory  
9 of equivalency. *See Sullivan v. Zebly*, 493 U.S. 521, 530-31 (1990) (“For a claimant to show  
10 that his impairment matches [or is equivalent to] a listing, it must meet all of the specified  
11 medical criteria [of the listed impairment].”); *Lewis*, 236 F.3d at 514 (ALJ’s failure to consider  
12 equivalence was not reversible error where the claimant offered no theory, plausible or  
13 otherwise, as to how his impairments combined to equal a listed impairment). Thus, the ALJ  
14 did not err in assessing plaintiff’s mental impairments at step three.

15 D. The ALJ Erred in Assessing Plaintiff’s RFC by Failing to Evaluate the Amount  
16 of Time Plaintiff Could Sit or Stand During a Typical Work Day

17 Plaintiff contends that the ALJ’s RFC assessment is insufficient because the ALJ did  
18 not provide a function-by-function assessment regarding the amount of time plaintiff could sit  
19 or stand during an eight-hour workday. Dkt. 16 at 10. Specifically, the ALJ’s RFC assessment  
20 provides that plaintiff has the ability “to perform light work and lift and carry 20 pounds  
21 occasionally and 10 pounds frequently with a sit-stand option at will and an ability to walk 4  
22 hours in an 8-hour workday.” AR at 19. Plaintiff argues that SSR 96-8 requires an ALJ to  
23 separately address a claimant’s limitations and “remaining abilities to perform each of seven  
24 strength demands: Sitting, standing, walking, lifting, carrying, pushing, and pulling” in an RFC

1 assessment. *Id.* Specifically, SSR 96-8 provides that “[e]ach function must be considered  
2 separately (e.g., ‘the individual can walk for 5 out of 8 hours and stand for 6 out of 8 hours’),  
3 even if the final RFC assessment will combine activities (e.g., ‘walk/stand, lift/carry,  
4 push/pull’).” Plaintiff contends that contrary to SSR 96-8’s requirement, the ALJ’s decision  
5 does not provide any separate findings about plaintiff’s ability to sit or stand. Dkt. 16 at 11.  
6 Plaintiff contends that this error was harmful, because “it is not clear whether Plaintiff can  
7 stand long enough to perform her past relevant work as a pharmacy technician, DOT 074.382-  
8 010, which is a light job as it is performed in the national economy.” *Id.*

9         The Commissioner responds that an ALJ must resolve conflicts in the medical  
10 evidence, and in this case, “the ALJ properly found that Plaintiff could periodically alternate  
11 sitting and standing at will to relieve pain or discomfort. This limitation appropriately allowed  
12 Plaintiff to dictate when she needed to alternate her sitting and standing.” Dkt. 20 at 14 (citing  
13 AR at 19). The Commissioner also argues that the ALJ afforded “some weight” to the state  
14 agency reviewing physician’s opinion, which provided that plaintiff could stand and/or walk at  
15 least 2 hours out of an 8 hour workday, and sit about 6 hours out of an 8 hour workday. *Id.*  
16 (citing AR at 443-50).

17         The RFC requires the ALJ to consider a claimant’s ability to meet certain job demands,  
18 such as physical demands, mental demands, sensory requirements, and other functions. 20  
19 C.F.R. §§ 404.1545(a), 416.945(a). This requires an assessment of the claimant’s exertional  
20 limitations (sitting, standing, walking, lifting and carrying abilities) and non-exertional  
21 limitations (postural and manipulative abilities and mental capacity). SSR 96-8p. Social  
22 Security Ruling 96-8p provides that an RFC assessment must “first identify the individual’s  
23 functional limitations or restrictions and assess his or her work-related abilities on a function-  
24 by-function basis.” SSR 96-8p at \*1. *See also* 20 C.F.R. §§ 404.1545(b)-(d); 416.945(b)-(d).

1 This sequential evaluation process is important because “a failure to first make a function-by-  
2 function assessment of the individual’s limitations or restrictions could result in the [ALJ]  
3 overlooking some of an individual’s limitations or restrictions.” SSR 96-8p, at \*4. Pursuant to  
4 the narrative discussion requirement provided in SSR 96-8, in the ALJ’s discussion of the  
5 claimant’s abilities to perform any of the seven strength demands (i.e., sitting and standing),  
6 “each function must be considered separately (e.g., ‘the individual can walk for 5 out of 8  
7 hours and stand for 6 out of 8 hours’), even if the final RFC assessment will combine activities  
8 (e.g., ‘walk/stand, lift/carry, push/pull’). It is especially important that adjudicators consider  
9 the capacities separately when deciding whether an individual can do past relevant work.”  
10 SSR 96-8p.

11 Although the Commissioner implies that the ALJ implicitly adopted the opinion of the  
12 state agency reviewing physician with respect to plaintiff’s ability to sit or stand in this case,  
13 there is no mention of this in the ALJ’s decision. To the contrary, the ALJ simply noted that  
14 the state agency opinion deserves “some weight.” AR at 24. As the ALJ did not provide a  
15 function-by-function assessment of plaintiff’s physical ability to sit and stand as directed by  
16 SSR 96-8p in either the ALJ’s narrative or final RFC assessment, the ALJ erred. On remand,  
17 the ALJ shall assess plaintiff’s work-related abilities on a function-by-function basis, and  
18 separately discuss plaintiff’s ability to sit and stand during a normal workday.

19 E. The ALJ Erred in Evaluating the Lay Witness Testimony of Plaintiff’s  
20 Husband, Robert Durbin

21 Plaintiff’s husband of thirty-two years, Robert Durbin, also testified during the  
22 administrative hearing. AR at 74-80. Specifically, Mr. Durbin testified that after plaintiff  
23 injured her back while lifting a tote in 2000, she was in “almost constant pain” which “really  
24 started depressing her.” AR at 75. He testified that she stopped working because “she was

1 required to be on her feet all day long with her job and it just got to be too much trouble for  
2 her. I mean, she was in constant pain and she would come home at night, and she would just  
3 cry . . . [W]e were going to doctors all the time trying to get some help, trying to find out what  
4 we could do.” AR at 75-76. He also testified that due to the symptoms of her fibromyalgia,  
5 back pain, and depression, she had a window in the morning where her pain was a little less so  
6 she could take their daughter to school, but “usually by noon she would be flat on her back in  
7 bed.” AR at 76. Mr. Durbin asserted that by 2002-2003, he had taken over doing the family’s  
8 laundry, grocery shopping, yard work, and cooking. AR at 76. When the family attempted to  
9 take a trip to Idaho, “her back pain was just so great we had to turn around and go home.” AR  
10 at 78. Although his wife continued to be interested in scrapbooking and other hobbies, she  
11 could only engage in such crafts for one hour before having to go lay down. AR at 79. The  
12 ALJ summarized Mr. Durbin’s testimony, and later stated that Mr. Durbin’s testimony  
13 concerning the intensity, persistence, and limiting effects of plaintiff’s symptoms were not  
14 credible to the extent that they were inconsistent with the RFC assessment. AR at 20-21.

15 In order to determine whether a claimant is disabled, an ALJ may consider lay-witness  
16 sources, such as testimony by nurse practitioners, physicians’ assistants, and counselors, as well  
17 as “non-medical” sources, such as spouses, parents, siblings, and friends. *See* 20 C.F.R. §  
18 404.1513(d). Such testimony regarding a claimant’s symptoms or how an impairment affects his  
19 ability to work is competent evidence, and cannot be disregarded without comment. *Dodrill v.*  
20 *Shalala*, 12 F.3d 915, 918-19 (9th Cir. 1993). If an ALJ chooses to discount testimony of a lay  
21 witness, he must provide “reasons that are germane to each witness,” and may not simply  
22 categorically discredit the testimony. *Dodrill*, 12 F.3d at 919.

23 Plaintiff contends that the ALJ did not provide germane reasons for rejecting the lay  
24 witness testimony of plaintiff’s husband, Robert Durbin. Dkt. 16 at 22. Specifically, plaintiff



1 argues that Mr. Durbin testified that plaintiff was more limited than found by the ALJ, because  
2 she had to lie down during the day. AR at 76-79. Plaintiff asserts that in this case, “the ALJ  
3 simply noted that Mr. Durbin’s testimony was not credible to the extent it was inconsistent  
4 with his [RFC] assessment, but did not give any specific reasons for rejecting it.” Dkt. 16 at  
5 23. The Commissioner responds that “the ALJ properly considered Mr. Durbin’s testimony  
6 and provided a germane reason for disregarding his opinion that plaintiff was unable to work.”  
7 Dkt. 20 at 12.

8 Plaintiff is correct. The ALJ summarily rejected Mr. Durbin’s testimony to the extent it  
9 was inconsistent with the ALJ’s RFC assessment, but did not provide any specific and germane  
10 reasons for doing so. On remand, the ALJ is directed to reconsider, or at least further support,  
11 his findings with respect to Mr. Durbin’s lay witness testimony.

12 F. Remand Requires a Reevaluation of the Analysis at Steps Four and Five

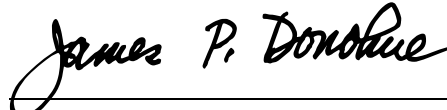
13 Plaintiff contends that the ALJ erred by finding that plaintiff could perform her past  
14 relevant work based on the testimony of the vocational expert (“VE”) which conflicted with  
15 the Dictionary of Occupational Titles (“DOT”). Dkt. 16 at 11. The Commissioner responds  
16 that the ALJ did not err by finding that plaintiff was able to perform her past work as generally  
17 performed in the national economy. Dkt. 20 at 16.

18 The Court need not determine whether the ALJ erred at step four because this case is  
19 already being remanded for further proceedings. If the ALJ considers testimony from a VE on  
20 remand, however, the ALJ is directed to make an appropriate inquiry in accordance with SSR  
21 00-4p to determine whether the testimony conflicts with the DOT. If it does, the ALJ must  
22 obtain a reasonable explanation for the conflict before relying on that testimony at steps four or  
23 five of the sequential evaluation process.

VIII. CONCLUSION

For the foregoing reasons, the Court recommends that this case be REVERSED and REMANDED to the Commissioner for further proceedings not inconsistent with the Court's instructions. A proposed order accompanies this Report and Recommendation.

DATED this 4th day of November, 2011.

  
JAMES P. DONOHUE  
United States Magistrate Judge